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SUPREME COURT  
OF THE STATE OF WASHINGTON

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CHRISTOPHER PIRIS,

Appellant,

vs.

ALFRED KITCHING and JANE DOE KITCHING, husband and wife and  
their marital community, SOCIETY OF COUNSEL REPRESENTING  
ACCUSED PERSON (SCRAP), ERIC NIELSEN and JANE DOE  
NIELSEN, husband and wife and their marital community, NIELSEN  
BROMAN & KOCH PLLC, KING COUNTY,

Respondents.

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SUPPLEMENTAL BRIEF OF  
RESPONDENTS SCRAP AND AL KITCHING

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 ORIGINAL

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## I. INTRODUCTION

This Court's decision in *Ang v. Martin*, 154 Wn.2d 477, 114 P.3d 637 (2005), established a clear rule requiring all plaintiffs asserting a malpractice claim against their criminal defense attorneys to prove actual innocence as an element of their claims. The clear rule has no exceptions. Mr. Piris's argument that he need not establish innocence, and that the Superior Court erred by requiring it, is wrong. *Ang* supports affirmance.

The Court of Appeals in its *Powell* decisions<sup>1</sup> embraced a limited exception to *Ang*. This was beyond its authority. The Court should overrule *Powell I* and *II*. This Court should reject the *Powell* exception that turns on whether the alleged malpractice related to the imposition of a sentence that exceeds the maximum allowed by law. This exception is contrary to the public policy reasons supporting the innocence requirement. Such an exception creates uncertainty. Such an exception leads to *ad hoc* decisions and inconsistent results regarding whether the facts of any particular case strike a judge as falling more or less firmly within the enumerated policies underlying the innocence requirement. Equivocation would undermine the clear *Ang* rule.

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<sup>1</sup> *Powell v. Associated Counsel for the Accused* ("Powell I"), 125 Wn. App. 773, 106 P.3d 271, *rev granted*, 155 Wn.2d 1024, 123 P.3d 120 (2006) (reviewing dismissal of criminal malpractice claim under CR 12(b)); *Powell v. Associated Counsel for the Accused*, 131 Wn. App. 810, 129 P.3d 831 (2006) ("Powell II").

If this Court approves the exception created in *Powell*, it still should conclude that dismissal of Mr. Piris's ("Piris") claim was correct. Piris's circumstances do not fit the limited exception. Piris's sentence of 159 months was not beyond the maximum sentence of life for the crimes for which he pled guilty and also was not beyond the correct sentencing range of 146 to 194 months. Piris did not receive an "illegal" sentence. Affirmance is proper on these facts.

## II. ISSUE PRESENTED FOR REVIEW

The Court accepted this issue:

In a claim for attorney malpractice, is "actual innocence" relevant if the plaintiff's attorneys erred in calculating the plaintiff's sentencing range, the sentence was overturned on appeal but the plaintiff was not timely resentenced and these errors resulted in the plaintiff serving a sentence that was 13 months longer than the sentence lawfully, but belatedly, imposed on remand?

Petition 1.

Respondents SCRAP and Al Kitching (both referred to as "SCRAP") restate the issue as follows:

Did the trial court correctly grant summary judgment dismissing Piris's legal malpractice claims against his criminal defense attorneys because he did not meet his burden under *Ang* to establish actual innocence of the underlying crimes?

In the alternative, was summary judgment correct because these facts do not fit the limited *Powell* exception where Piris's sentence of 159 months was not beyond the maximum sentence of life for the crimes for which he pled

guilty and also was not beyond the correct sentencing range of 146 to 194 months, and where Piris failed in his proof to show how long of a sentence he served?

### **III. STATEMENT OF THE CASE**

Piris pled guilty to two counts of Rape of a Child in the First Degree. CP 36. Piris does not claim to be innocent. The maximum sentence for each count of this crime was life imprisonment and a fine of \$50,000. CP 30. Judge Charles Mertel in May 1999 heard the testimony regarding the abuse inflicted by Piris on the child, his step-brother. CP 68. Based upon Piris's purported offender score under the Sentencing Reform Act, RCW 9.94A ("SRA"), and corresponding standard sentencing range of 159 to 211 months, Judge Mertel sentenced Piris to 159 months of confinement for both counts concurrently. CP 57.

Piris's public defender, SCRAP, timely appealed this sentence. CP 77. Appellate attorney Eric Nielsen was appointed and argued on appeal that the offender score and corresponding standard sentencing range had been incorrect. CP 79, 85. He argued that Piris's offender score was incorrectly calculated by utilizing the current version of RCW 9.94A.360 instead of the version in effect at when Piris committed the crimes. CP 85.

The State did not resist the appeal. CP 93 ("The State concedes that Piris is entitled to be sentenced under the 1993 statute and agrees the case should be remanded for resentencing."). The State conceded that by

calculating Piris's offender score under the version in effect when Piris committed his crimes, he had an offender score of 6 instead of 7. CP 93. With an offender score of 7, Piris's crimes carried a standard sentencing range of 159 to 211 months. CP 92. With the corrected offender score of 6, Piris's crimes carried a standard sentencing range of 146 to 194 months. CP 93. The sentence of 159 months falls within both the original range and the corrected range. *Id.*

The Court of Appeals remanded the case for resentencing in a *per curiam*, unpublished opinion. CP 93. No resentencing was scheduled. Interrogatory responses show that Mr. Nielsen sent the decision to Piris consistent with his habit and custom. CP 98-99 at Rog 4. Court of Appeals records show the decision was sent to Piris. CP 91. The record lacks evidence why resentencing did not occur. The Petition repeatedly makes unsupported assertions that Piris never learned about the remand; however, Piris failed to present any evidence that he lacked knowledge of the resentencing directive.

Piris later was released from incarceration. CP 136. The record does not identify the length of time of Piris's incarceration for the crimes to which he pled guilty—a major evidentiary failure in Piris's opposition to summary judgment. The record indicates that Piris served somewhere

between 134 and 154 months.<sup>2</sup> The Petition repeatedly makes unsupported assertions regarding how long Piris served.

When Piris violated a condition of his release from custody and a hearing was held in May 2012 to address this violation, the Court discovered that he was never resentenced. CP 153. At this time, Judge Bradshaw resentenced Piris—who had already been released—to 146 months of confinement for both counts concurrently. CP 196-201. The Court of Appeals Opinion notes, “The record is silent as to the resentencing court’s rationale for the sentence imposed.” Opinion 4.

Piris initiated this malpractice action in March 2013, alleging that his prior attorneys committed legal malpractice. CP 154. Piris added King County to this lawsuit, alleging negligence based on the Office of Public Defense’s failure to schedule a resentencing. *See* CP 20-24.

All defendants moved for summary judgment. CP 1-14 (Nielsen’s Motion); CP 144-45 (SCRAP Joinder); CP 148-50 (King County’s Joinder). The Honorable Richard Edie granted summary judgment to the defendants, citing *Ang*. CP 248-50.

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<sup>2</sup> Between the date of sentencing and the date of his release, Piris may have spent approximately 134 months in custody. CP 137. At the time of his sentencing, however, he had already been incarcerated for somewhere between 133 days (4.5 months) and 17 months; some of this time may relate to other charges or convictions. CP 5, 69, 72-73. Piris’s proof fails to show the relevant period of incarceration. *See* Opinion note 2.

The Court of Appeals affirmed. The Court of Appeals concluded that Piris's negligence claims required that he establish actual innocence and that his claims do not fall under the limited *Powell* exception. Opinion 11 ("We conclude that *Powell* is distinguishable from the present case."). The Court of Appeals reasoned that the policies underlying *Ang* apply. Opinion 11-15.

#### IV. ARGUMENT

This Court should affirm the summary dismissal under either *Ang* or *Powell*. The dismissal first is compelled by *Ang*. *Ang* established in 2005 the requirement that a plaintiff must establish actual innocence to support any claim of malpractice against a criminal defense attorney. Judge Eadie correctly applied this unambiguous rule. This analysis ends the inquiry.

In *Powell II*, the Court of Appeals took the liberty of creating a limited exception to *Ang*. This was not within the appellate court's authority. The Court should overrule the exception recognized in *Powell II*. If it does not overrule *Powell II*, the Court should conclude that the exception does not apply to Piris's case. Piris's sentence neither exceeded the maximum sentence allowed by law nor exceeded the correct sentencing range. His case is distinguishable from that of Mr. Powell, who

alleged (incorrectly, it turns out<sup>3</sup>) that he received a sentence beyond the maximum allowed by law. Piris did not receive a sentence beyond the maximum allowed by law. Piris also failed in his proof on summary judgment to show that he served more than his revised sentence of 146 months. *Powell II* does not change the result of Piris's case.

**A. Piris's criminal malpractice claims were properly dismissed on summary judgment under *Ang* where he concedes there is no question of his guilt.**

Piris pleaded guilty to his crimes. He cannot meet, and did not attempt to meet, his evidentiary burden under the innocence requirement to show actual innocence. The Superior Court correctly dismissed his claims under *Ang*. CP 248-50.

The Court of Appeals relied on *Ang* when it affirmed. Opinion 5-9. *Ang* established that actual innocence is an essential element of a legal malpractice claim arising from an attorney's representation of a client in criminal proceedings. *Ang*, 154 Wn.2d at 482-83 (adopting the rule and approving *Falkner v. Foshaug*, 108 Wn. App. 113, 29 P.3d 771 (2001)). See also *Owens v. Harrison*, 120 Wn. App. 909, 914-15, 86 P.3d 1266 (2004) (applying innocence requirement).

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<sup>3</sup> After reversal and remand of the CR 12(b)(6) dismissal reviewed in *Powell I* and *II*, it was proven on summary judgment that Mr. Powell had been sentenced appropriately. The summary judgment based on established facts, as opposed to allegations, was affirmed. See 146 Wn. App. 242, 191 P.3d 896 (2008) ("*Powell III*").

This Court in *Ang* explained that the actual innocence requirement is essential to demonstrate proximate cause in a criminal law malpractice claim, explaining the rationale as follows:

[P]roving actual innocence, not simply legal innocence, is essential to proving proximate causation, both cause in fact and legal causation. *Falkner*, 108 Wn. App. at 115 (noting that criminal malpractice plaintiff must prove that “deficient representation, not his illegal acts . . . [was] the proximate cause” of harm). Unless criminal malpractice plaintiffs can prove by a preponderance of the evidence their actual innocence of the charges, their own bad acts, not the alleged negligence of defense counsel, should be regarded as the cause in fact of their harm. Likewise, if criminal malpractice plaintiffs cannot prove their actual innocence under the civil standard, they will be unable to establish, in light of significant public policy considerations, that the alleged negligence of their defense counsel was the legal cause of their harm.

*Ang* at 484-85. The innocence requirement prevents criminal malpractice plaintiffs from blaming their attorneys when their own bad acts were the cause of their incarceration or predicament. Criminal malpractice plaintiffs can satisfy the necessary elements of cause in fact and legal cause by showing actual innocence. Such a showing will justify supplanting their own responsibility and holding their attorneys accountable for the harm. Without such a showing, Washington law views the bad acts of the criminals as the cause of their harm, regardless of whether they could have gotten a “better deal” (i.e., a shorter sentence) had their defense counsel done something differently.

This Court thoroughly vetted the policy objectives behind the requirement when it decided *Ang*. These important objectives include preventing criminals from benefiting from their own bad acts and preventing a flood of nuisance litigation from criminals who believe they could have gotten a better deal. This Court approved the rationale that “[r]equiring a defendant to prove by a preponderance of the evidence that he is innocent of the charges against him will prohibit criminals from benefiting from their own bad acts, maintain respect for our criminal justice system’s procedural protections, remove the harmful chilling effect on the defense bar, prevent suits from criminals who ‘may be guilty, [but] could have gotten a better deal,’ and prevent a flood of nuisance litigation.” *Ang* at 485, citing *Falkner*, 108 Wn. App. at 123-24.

Before the Court of Appeals endorsed the actual innocence requirement, it surveyed application of the rule in California, Illinois, Massachusetts, Nevada, and New York. *Falkner*, 108 Wn. App. at 119 n. 12. It agreed with the reasoning of these jurisdictions that had adopted the requirement. *Id.* By the time this Court approved *Falkner*, it identified the additional jurisdictions of Missouri, Pennsylvania, New Hampshire, Nebraska, Florida and Wisconsin to also impose an actual innocence requirement. 154 Wn.2d at 483 n. 4. Additional jurisdictions with an

innocence requirement include Alaska<sup>4</sup> and Kentucky<sup>5</sup>. Other states have adopted a requirement of post-conviction relief,<sup>6</sup> or hold as a matter of law that a plaintiff who plead guilty or is not innocent cannot establish the necessary elements of a malpractice claim.<sup>7</sup> Innocence, therefore, is a main consideration for many states. Only a minority of states fail to require innocence in some form in legal malpractice actions, usually where the issue has not been joined. See Mallen, Ronald E., *Legal Malpractice* 27:41 (2015).

*Ang* unequivocally supports affirmance.

**B. This Court should overrule the exception to *Ang* created by the Court of Appeals in *Powell* or, if this Court approves the exception, it should find the exception inapplicable to these facts.**

The *Powell* decisions do not change the result here. This Court

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<sup>4</sup> *Shaw v. State Dept. of Admin.*, 861 P.2d 566, 572 (Alaska 1993) (defendant may raise the plaintiff's actual guilt as an affirmative defense).

<sup>5</sup> *Ray v. Stone*, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (innocence is "a prerequisite to proving causation or one of the elements of the alleged negligence").

<sup>6</sup> See *Ang, supra*, at note 3. See also *Mylar v. Wilkinson*, 435 So. 2d 1237 (Ala. 1983); *Levine v. Kling*, 123 F.3d 580, 583 (7th Cir. 1997) (applying Illinois law); *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993); *Gibson v. Trant*, 58 S.W.3d 103, 117 (Tenn. 2001); *Silvers v. Brodeur*, 682 N.E.2d 811, 818 (Ind. App. 1997); *Gebhardt v. O'Rourke*, 510 N.W.2d 900 (Mich. 1994); *Duncan v. Campbell*, 1997-NMCA 028, 936 P.2d 863 (N. M. Ct. App. 1997); *Krahn v. Kinney*, 538 N.E.2d 1058 (Ohio 1989).

<sup>7</sup> See, e.g., *Gomez v. Peters*, 470 S.E.2d 692 (Ga. App. 1996) ("plaintiff is precluded from [showing he would have prevailed in the underlying litigation] if he has pled guilty."), *cert. den.*, 1996 Ga. LEXIS 740 (1996).

either should overrule *Powell I* and *II*, or conclude that the facts of Piris's case do not meet the exception.

Prior to the Court's *Ang* decision, Division I had excused the plaintiff in *Powell* from the innocence requirement laid down in *Falkner* and *Owens*. After this Court decided *Ang*, it directed the Court of Appeals to reconsider the still pending *Powell I* decision in light of *Ang*. *Powell I*, 155 Wn.2d 1024, 123 P.3d 120 (2006). Notwithstanding that direction and the rule endorsed in *Ang*, the Court of Appeals declined to change course. *Powell II*, *supra*, 131 Wn. App. at 831-32 ("Because the reasons articulated in *Ang* for requiring a plaintiff to prove his innocence as part of a legal malpractice claim are not applicable in Powell's situation, we reaffirm our prior opinion."). The Court of Appeals continued to articulate an exception that *permits* a malpractice claim against a criminal defense attorney in the absence of innocence. It announced its adoption of "a very limited exception" to the Supreme Court's actual innocence requirement. *Powell II*, 131 Wn. App. at 815. The Court of Appeals expressed its confidence that "Powell's case is more akin to that of an innocent person wrongfully convicted than of a guilty person attempting to take advantage of his own wrongdoing." *Id.*

No party sought review of *Powell II*.

This Court now should overrule *Powell I* and *II* because the

exception contradicts *Ang*. The Court of Appeals must apply controlling precedent. The Supreme Court has stated, “A decision by this court is binding on all lower courts in the state.” *1000 Virginia Ltd. P’ship v. Vertecs*, 158 Wn.2d 566, 576-80, 146 P.3d 423 (2006). “When the Court of Appeals fails to follow directly controlling authority by this court, it errs.” *Id.* In *Vertecs*, the Court of Appeals failed to apply controlling precedent holding that a contract claim accrues on breach and not on discovery, and instead adopted a new discovery rule. *Id.* This Court said the lower appellate court had no authority to do so. *Id.* Here, the Court of Appeals in *Powell II* made the same mistake. The *Powell II* panel failed to apply the controlling precedent holding that actual innocence is a required element of any malpractice claim against a criminal defense attorney, and instead adopted an exception. *Vertecs* counsels that the Court of Appeals exceeded its authority in *Powell II*. This decision should be overruled.

This Court should not endorse the exception articulated in *Powell II*. A principled analysis shows that the policy reasons for the innocence rule apply even if a sentence has been imposed that exceeds the maximum sentence for the crime. A guilty criminal malpractice plaintiff complaining of an excessive sentence will be prevented from benefitting from his own bad acts by receiving money from the attorneys who represented him, including those provided by the public. Enforcement of the innocence rule

in such circumstances continues to prevent “could have gotten a better deal” lawsuits like this one (where Piris argues he could have been sentenced to less time, even though the sentence was within the correct sentencing range). The defense bar will remain unchilled by the threat of lawsuits and free of disincentive to assist efforts by their former clients to show ineffective assistance of counsel in post-conviction proceedings. And a flood of nuisance litigation still will be avoided that otherwise would cause the courts and defense counsel to spend time and resources defending. Even in *Powell* where the court considered the allegations of an incorrect sentence “egregious,” they turned out to fail on the merits. The *Powell* case was, in fact, nonmeritorious litigation that would have been avoided under the rule adopted by this Court in *Ang*.

The *Powell* exception takes the clear directive of *Ang* and plunges it into uncertainty. The rationale of *Powell* would invite individual courts to weigh whether the particular facts of a specific case show that the plaintiff is “more like an innocent person” or more like “a guilty person.” *Powell* invites *ad hoc* weighing of the policies enumerated in *Ang* against fact-specific claims raised in court. *Powell* invites lower courts to judge whether the necessary elements are shown based on an individualized assessment of the “fairness” of application of the innocence requirement to any case. This is not a desirable path, as arguably in any circumstance one

could argue this rule is “unfair.” This Court already has decided that any guilty person may not use tort law to profit where his own criminal actions have involved him in the criminal justice system and caused his or her incarceration both factually and legally. *Powell* undercuts this policy.

Even where the Court of Appeals strived to minimize the reach of its exception in *Powell* by emphasizing that it applies only in “very limited” circumstances, small exceptions quickly become large. Lawyers representing potential plaintiffs will seek to analogize the facts in *Powell*, like here. As former criminals like Piris attempt to fall within the exception, all the policy reasons articulated in *Ang* will flounder. Piris argues his sentence falls within the *Powell* exception because when resentenced years later by a different judge, he received a shorter sentence. But the sentence Judge Mertel originally would have given Piris had he been working with the correct standard range cannot be known. Piris must speculate to argue it would have been lower than 159 months. Opinion at 12 (“[I]t is impossible to know whether the original sentencing court would have imposed 146 months or 159 months based on a correct offender score calculation.”). Piris’s argument is precisely the “could have gotten a better deal” argument the Court aimed to avoid in *Ang*. Piris’s claim demonstrates how the exception would open the door to a wide variety of claims, undermining the policies adopted in *Ang*.

If this Court were to endorse the exception stated in *Powell II*, it still should affirm. The facts do not fall within that exception. Piris's sentence was legal both according to the maximum term and the correct standard sentencing range. First, his original sentence was within the maximum term allowed by statute. The maximum term was life. CP 30. Piris has been released. Second, Piris's original sentence of 159 months was on the low end of the correct standard sentence range of 146 to 194 months. CP 57, 93. If this Court were to adopt the "very limited exception" of *Powell II*, it should use this case to demonstrate the exception's narrow reach. The Court should hold that Piris failed to establish facts qualifying for the exception.

Affirmance also is justified because Piris failed to establish how many months he served for his crimes. He failed to come forward with evidence to show that he was incarcerated more than 146 months.

Applying the *Ang*, *Falkner*, *Owens*, and even the *Powell* decisions, this Court should affirm the summary judgment.

**C. The Court should not create an exception to *Ang* that treats sentencing errors differently from any other assertion of malpractice, as shown in *Owens*.**

The Court should reject any invitation to create any larger exception than intended even by the *Powell II* panel that excepts from the

innocence rule all alleged sentencing errors.<sup>8</sup> Such an exception would contradict *Ang* and its enumerated policies. The Court of Appeals rejected a similar exception proposed in *Owens v. Harrison*, 120 Wn. App. 909, 914-15, 86 P.3d 1266 (2004) (plaintiff unsuccessfully asked the court to carve an exception to the innocence requirement where defense counsel failed to convey a plea offer which resulted in an increased sentence).

Piris advocates for the creation of a new, large exception to *Ang* for any alleged sentencing error. *See Petition* 4-6. Piris misrepresents the scope of the exception recognized in *Powell II* when he characterizes the *Powell II* court as having “held that it is sufficient for a plaintiff to allege (i) that his attorney’s negligence resulted in a sentencing error and (ii) that plaintiff obtained post-conviction sentencing relief.” *Petition* 5 (underline added). This is not the rule announced in *Powell II*.

The Court of Appeals already has refused to confine the innocence requirement to the guilt phase of criminal proceedings. *See Owens v. Harrison*, 120 Wn. App. 909, 914-15, 86 P.3d 1266 (2004) (innocence requirement applies to claim of malpractice regarding plea bargain). In

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<sup>8</sup> Piris’s briefs make the same mistake found in *Powell I* and *II* by failing to acknowledge the procedural posture of the case. The issues of the standard of care and whether there was malpractice have not been joined. The case concerns only whether actual innocence is a required element. Malpractice should not be assumed in fairness to the litigants and the burden of proof that Piris faces if he secures a remand.

*Owens*, the Court of Appeals rejected an appellant's request to carve up the innocence rule, noting that jurisdictions that have such exceptions do not satisfy the public policy rationale upon which the innocence requirement had been adopted in Washington. *Id.* The specific public policy reasons behind Washington's innocence requirement apply no matter the particular posture in which the negligence occurred. *Id.* The *Owens* court—prior to the *Ang* decision—declined to qualify the innocence requirement based on the act of negligence or phase of representation in which the alleged negligence occurred. *Id.* The Court should continue this approach.

The Court of Appeals Opinion in this case correctly concludes that treating alleged sentencing errors differently would open the floodgates of litigation where sentencing errors are, unfortunately, not uncommon because of the exceedingly convoluted statutory layers of rules that must be sorted and applied during the sentencing phase. Opinion note 12 citing the SRA; *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003). The Court of Appeals properly took notice that the SRA has been amended by 181 session laws since its adoption in 1981 and that the 58<sup>th</sup> legislature alone considered 262 changes to the SRA. *Id.* Piris's assertions that "failure to properly calculate a sentence under the SRA is not a common oversight," *see Petition 8*, is unsupported and contradicted by the citations.

The Opinion correctly observes that “[i]nterpreting and harmonizing amendments to the SRA has increasingly occupied the time of both trial and appellate courts.” Opinion note 12. The concern of the Court of Appeals that the floodgates of malpractice litigation would open if an exception were applied to any alleged sentencing error goes straight to the heart of the policy reasons supporting adoption of the innocence rule in *Ang*. Excluding alleged sentencing errors from the innocence requirement, therefore, would be incompatible with the policy reasons for the rule.

Piris attempts to argue both sides of the coin regarding how big of an exception he seeks. He argues that the errors in his case are especially “egregious,” Petition 7-8, suggesting that an exception would not engulf the rule. He simultaneously articulates a broad exception, i.e., whenever a plaintiff can establish a sentence that did not comply with SRA. An exception from the innocence requirement for any sentencing error would create a tremendous increase in criminal malpractice litigation.

Piris’s argument is unpersuasive that a guilty criminal defendant cannot be considered to have “caused” his incarceration if the sentence turns out to be incorrect under the SRA. *See Petition* 6, 10. Piris argues that it is only obvious that the criminal is not to blame for an “illegal sentence.” But it is not so obvious. The crime itself caused the plaintiff to enter the criminal justice system, leading to the allegedly “harmful”

incarceration. As to “cause in fact,” it cannot be said that the criminal is not the cause of his own harm. “But for” his criminal act, the plaintiff would never have come to be sentenced. As to “legal cause,” the Court already has determined that where a criminal defendant is not innocent, he alone should be considered the cause of his damage. Here, Piri’s convictions and sentence were the result of a plea bargain. CP 36. At trial, he might have been convicted of more charges and received a longer sentence. His crimes were the cause of his incarceration. Nothing justifies changing this conclusion based on the type of error alleged, whether it concerns the guilt phase, a plea, sentencing, bail, negotiation of an amnesty agreement or any type of imaginable mistake that might occur during a criminal representation. Society should place the responsibility on the criminal defendant. Piri’s claim, and others like it, remains a “could have gotten a better deal” claim that this state has rejected.

The citation of deterrence as a reason to eviscerate the innocence requirement is flawed. *Petition 11*. Criminal defense attorneys are among the most dedicated professionals who believe in our system of justice. They need no greater motivation to do a good job. They routinely cooperate to demonstrate their own ineffective assistance of counsel where it would aid their clients. Instead of deterring criminal defense attorneys from committing malpractice, Piri’s rule could have the reverse

consequence of deterring attorneys from continuing to advocate for their clients by supporting their claims of ineffective assistance of counsel.

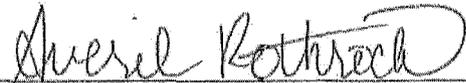
The innocence requirement is fair and rationale. It protects criminal defense attorneys from assuming responsibility for the consequences of the crimes their clients have committed.

#### V. CONCLUSION

This Court should affirm. *Ang* required Piris to establish his innocence. Piris's attempt to rely on an exception to *Ang* fails either because the *Powell* exception is ill-conceived and should be rejected, or because Piris's evidence fails to satisfy it.

Respectfully submitted on this 26<sup>th</sup> day of October, 2015.

SCHWABE, WILLIAMSON & WYATT, P.C.

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Kitching and his marital community*

**CERTIFICATE OF SERVICE**

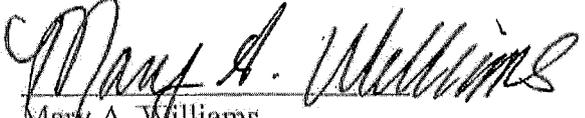
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 26<sup>th</sup> day of October, 2015, I arranged for service *via U.S. Mail* of the foregoing SUPPLEMENTAL BRIEF OF RESPONDENTS SCRAP AND AL KITCHING on the parties to this action as follows, with a courtesy copy by email:

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**Subject:** Piris v. Kitching, et al./No. 91567-9: Filing of Supplemental Brief of Respondent SCRAP and Al Kitching

Dear Clerk:

**Attached please find Respondents SCRAP and Al Kitching's Supplemental Brief to be filed with the Court.**

Thank you,

Mary

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